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09/709,234

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EXAMINER

DENNISON, JERRY B

ART UNIT

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PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

|                              |                                      |                                       |  |
|------------------------------|--------------------------------------|---------------------------------------|--|
| <b>Office Action Summary</b> | <b>Application No.</b><br>09/709,234 | <b>Applicant(s)</b><br>BOULTER ET AL. |  |
|                              | <b>Examiner</b><br>JERRY DENNISON    | <b>Art Unit</b><br>2443               |  |

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).

Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

1) ☒ Responsive to communication(s) filed on 13 October 2008.

2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.

3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

4) ☒ Claim(s) 1-9, 11-15, 17-19, 21, 23-32, 35-39, 41-43, 46 and 48 is/are pending in the application.

    4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.

5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.

6) ☒ Claim(s) 1-9, 11-15, 17-19, 21, 23-32, 35-39, 41-43, 46 and 48 is/are rejected.

7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.

8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

9) ☐ The specification is objected to by the Examiner.

10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a) ☐ All    b) ☐ Some \*    c) ☐ None of:

1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

1) ☐ Notice of References Cited (PTO-892)

2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)

3) ☐ Information Disclosure Statement(s) (PTO/SB/08)  
    Paper No(s)/Mail Date \_\_\_\_\_.

4) ☐ Interview Summary (PTO-413)  
    Paper No(s)/Mail Date \_\_\_\_\_.

5) ☐ Notice of Informal Patent Application

6) ☐ Other: \_\_\_\_\_.

### **DETAILED ACTION**

1. This Action is in response to Application Number 09/709,234 received on 10/13/2008.
2. Claims 1-9, 11-15, 17-19, 21, 23-32, 35-39, 41-43, 46 and 48 are presented for examination.

### ***Response to Arguments***

3. Applicant's arguments and amendments filed on 10/13/2008 have been carefully considered but they are not deemed fully persuasive.

Applicant asserts, "In contrast to Claim 1, which controls selection of data streams based on individual user preferences to prevent on-demand broadcast of data streams to the individual user, Herz provides the user with complete on-demand control over selection of the multimedia content that the user wishes to experience. Herz uses user preferences to select channel options to be presented to the user for choice by the user, and allows the user to select other programs as well" [Response, page 13, ¶ 3].

In response, the Examiner agrees that Herz allows the user to change between channels, but changing channels is much different than providing "on-demand" control. Just as Applicant claims multiple data streams, Herz provides multiple channels. The channels of Herz do not provide On-Demand functionality to the user. At most, the user only has control as to which channel to experience.

It appears that there is confusion between "channel surfing" and "on-demand." With "channel surfing" the user has the ability to "change the channel." This feature is completely different from "On-Demand", which is well known in the art to provide

functionality, in which, when a user is at a single channel, the user has the ability to choose from a list of media and play one of them "on-demand" on the single channel. For example, the channel for HBO On-Demand provides a list of movies that the user can choose from, and the chosen movie will immediately start playing on the HBO OD channel.

The Herz reference does not provide "on-demand" functionality. That is, the Herz reference does not provide a single channel that has a list of media to choose from and to play the selected media item immediately. What the Herz reference does provide is a way to minimize "channel surfing." Herz explains, "the number and content of general cable programming channels is scheduled in advance and typically cannot be changed by the customer through a simple voting system. As a result, the customer can only vary his or her video programming by changing channels" (Herz, col. 2, lines 47-55). The way Herz minimizes this "channel surfing" is by creating customized programming channels from all of the programming available at any time and broadcasting the customized programming channels to groups of customers. Herz creates virtual channels that have programs running on them, the programs being selected according to the users preferences. The user is able to select from the regularly broadcast cable channels as well as the virtual channels, but in no way can the user select one of these channels and then select a media item from a list to start playing immediately on the selected channel. Herz simply provides regular channels, with extra channels playing programs influenced by the user's preferences. Herz states, "The determined subset of video programs is [then] presented to the customer in

the conventional manner. As pointed out above, this conventional manner is simply providing multiple channels that the user selects from to view whatever program is already scheduled on the channels. This functionality clearly does not provide "On-Demand" functionality. As such, the rejections are respectfully maintained.

Applicant refers Examiner to "Herz' Abstract, which describes that Herz develops customer profiles for a recipient/customer to determine attractiveness of each video program to the recipient/customer and virtual channels are generated to produce a series of video or data programming which will provide the greatest satisfaction to each customer" [Response, page 13, ¶ 4].

Examiner notes that nothing in this remark describes "on-demand" functionality.

Applicant states, "Herz uses a selection algorithm to select a subset of available programs based on the preferences of the user, i.e., the programs that are most desirable for viewing by the customer (Herz, col. 5, lines 4-22) [Response, page 13, ¶ 4].

Examiner notes that Applicant's claims also selects streams based on the user's preferences.

Applicant states, "According to Herz, the user may select the desired video programming, which may or may not include the programming offered on the 'virtual channels' (Herz, col. 5, lines 16-18) [Response, page 13, ¶ 4].

Examiner notes that this citation means that the user can select a channel to experience, whether the channel is a regular broadcast channel or one of the virtual channels.

Applicant states, "In other words, the customer has total control over the video programming in Herz. If the customer selects an offered channel, the customer can choose to view the video programming that is presented to the customer or the customer can choose to select other programming. Herz gives the customer complete on-demand control over the video programming broadcast to the customer, as opposed to the claimed [limitation]." [Response, page 13, ¶ 4].

Examiner respectfully disagrees.

While the user has the ability to switch between channels, the user does not have the ability to change what is playing on a specific channel. Therefore, the user does not have total control over the video programming.

Applicant states, "Herz thus fails to teach or suggest multiple elements of Claim 1, in which individual user input influences but does not control selection of data streams, in which a selection method limits the user's control over selection of data streams to prevent on-demand broadcast of data streams, and in which the selection method uses individual user preferences for data streams to select data streams for broadcast to the individual user but prevents on-demand broadcast of data streams to the individual user" [Response, page 14, ¶ 1].

Examiner respectfully disagrees.

As shown in the previous rejection and shown by Applicant, Herz disclosed the creation of virtual channels that include a series of video or data programming which will provide the greatest satisfaction to each customer according to their preferences (Herz, col. 5, lines 4-22). The user can choose to experience one of these virtual channels, but the users control over the selected programs on this virtual channel is limited in that, the user does not have the ability to select a video program to immediately play on the virtual channel. The same goes for any channel that the user decides to experience.

As such, the rejections are respectfully maintained.

It is the Examiner's position that Applicant has not yet submitted claims drawn to limitations, which define the operation and apparatus of Applicant's disclosed invention in manner, which distinguishes over the prior art.

Failure for Applicant to significantly narrow definition/scope of the claims and supply arguments commensurate in scope with the claims implies the Applicant intends broad interpretation be given to the claims. The Examiner has interpreted the claims with scope parallel to the Applicant in the response and reiterates the need for the Applicant to more clearly and distinctly define the claimed invention.

### ***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

4. Claims 1-3, 5-8, 11-15, 17-18, 21, 24-26, 28-31, 35-39, 41-42, and 46 are are rejected under 35 U.S.C. 102(b) as being anticipated by Herz et al. (US 5,758,257).

5. Herz disclosed a system and method for scheduling broadcast of and access to video programs and other data using customer profiles, in which the head end (Fig. 5, 502) accesses data streams and provides these streams (Fig. 6 and Fig. 8) to customers based on their feedback (col. 8, lines 55-60). Herz explicitly disclosed that the system may be used not just for video programs, but also for music and music videos (Herz, col. 4, lines 31-40). As such, throughout the rejection, the term "program" as used in Herz will refer not only to the video programs but music as well.

Therefore, regarding claims 1 and 24, Herz disclosed a method comprising:

accessing a database of data streams by at least one server (Herz, col. 25, lines 56-60, Herz disclosed the video programming database at the head end; Herz, col. 42, lines 27-30, Herz disclosed the head end selecting the programs to send to the customer);

selecting at least one data stream for broadcast over a computer network to an individual user computer as a personalized internet radio station (Herz, see Abstract, "distributes many sources of data to many customers"; col. 5, lines 7-9, Herz disclosed the system determining a subset of the available programs at a particular point in time which is most desirable for viewing by the customer and presenting the subset to the customer for selection), said at least one data stream being selected from said



database according to a selection method performed by said at least one server to create a playlist of data streams (Herz, col. 5, "subset" allowing the customer to play from the subset), said selection method performed by said at least one server being influenced by input receivers from said individual user that comprises individual user preferences (Herz, col. 6, lines 50-56) for data streams to be broadcast but not controlled by said individual user's input so as to prevent on-demand broadcast of data streams to said individual user (Herz, col. 5, lines 1-10, Herz disclosed using an agreement matrix that compares customer profiles to content profiles to determine the subset; lines 7-12, Herz disclosed only offering a subset of the available programs to the customer, thereby limiting the user's control to only programs within that subset, clearly preventing on-demand broadcast);

transmitting said at least one selected data stream to said individual user computer from said at least one server via said network (Herz, Fig. 5, delivering from the head end 502 to the customer end terminals 412);

receiving feedback via said network at said at least one server, said feedback expressing an individual user preference of said individual user regarding said transmitted at least one data stream (Herz, col. 6, lines 35-40, Herz disclosed the customers providing feedback to the head end); and

updating said selection method using said individual user preference of said individual user (Herz, col. 6, lines 35-40, Herz disclosed updating the customer profiles based on the feedback; col. 8, lines 55-60, transmitting programs determined from the feedback),

said updated selection method performed by said at least one server biases selection of data streams to be experienced at said individual user computer in accordance with said individual user preferences and limits said individual user's control over selection of particular data streams from said database to prevent on-demand broadcast of data streams (Herz, col. 5, lines 1-10, Herz disclosed using an agreement matrix that compares customer profiles to content profiles to determine the subset; lines 7-12, Herz disclosed only offering a subset of the available programs to the customer, thereby limiting the user's control to only programs within that subset, clearly preventing on-demand broadcast).

Claim 24 includes a method with limitations that are substantially similar to the limitations of claim 1. Claim 24 also includes, "taking into account user input identifying those data streams that are to be excluded from being selected for transmission to said individual user computer." Herz disclosed filtering content to determine the subset most desired by the customer based on their feedback, and in one example the feedback including a showing of programs the customer did or did not watch (Herz, col. 6, lines 35-50) Therefore, Herz clearly disclosed filtering content based on user input. Such filtering of content must include excluding media from the media set in order to tailor the recommendations to the personalized interests of the user. Therefore, claim 24 is rejected under the same rationale.

6. Regarding claims 2 and 25, Herz disclosed the limitations as described in claims 1 and 24, including performing said selection method by said at least one server to

select a plurality of data streams from said database to generate a playlist of data streams to be transmitted to said individual user computer (Herz, col. 5, lines 5-10);

transmitting by said at least one server one data stream from said playlist of data streams to said individual user computer via said network (Herz, col. 8, lines 55-60);  
and

performing said step of updating by said at least one server to update said playlist of data streams using said individual user preferences (Herz, col. 8, lines 49-55).

7. Regarding claims 3 and 26, Herz disclosed the limitations as described in claims 1 and 24, including receiving by said at least one server via said network feedback expressing preferences from sources other than the said individual user (Herz, col. 6, lines 60-67).

8. Regarding claims 5 and 28, Herz disclosed the limitations as described in claims 1 and 24, including informing the said individual user generally regarding said database and said data streams (col. 12, lines 1-15);

querying the said individual user as to initial individual user data stream preferences and then performing said step of selecting at least one data stream from said database to generate an initial transmission list of data streams, said initial transmission list being selected using said initial individual user preferences and said selection method (col. 12, lines 1-35, initial questionnaire used to make up customer's profile, in order for the system to select the data stream to present to the user).

9. Regarding claims 6 and 29, Herz disclosed the limitations as described in claims 1 and 24, including wherein said data streams are selected from the group consisting of songs and videos (Herz, col. 4, lines 35-37).

10. Regarding claims 7 and 30, Herz disclosed the limitations as described in claims 2 and 25, including wherein said transmitted data stream is removed from said transmission list (Herz, col. 6, lines 35-50).

11. Regarding claims 8 and 31, Herz disclosed the limitations as described in claims 7 and 30, including wherein said data stream removed from said transmission list is listed on a transmitted data stream list (Herz, col. 6, lines 35-50, Herz disclosed filtering content to determine the subset most desired by the customer based on their feedback, and in one example the feedback including a showing of programs the customer did or did not watch)

12. Regarding claims 11 and 35, Herz disclosed a system comprising:  
at least one server connected to a computer network, said computer network connected to an individual the user computer (Fig. 5, 502, 412);

a database of media content data streams, said database available to said computer network (Herz, col. 25, lines 56-60, Herz disclosed the video programming

database at the head end; Herz, col. 42, lines 27-30, Herz disclosed the head end selecting the programs to send to the customer);

a data stream controller coupled to said at least one server, said data stream controller transmitting media content data streams to said individual user computer according to a selection program performed by the said at least one server to select data streams for broadcast over said computer network to said individual user computer (Herz, see Abstract, "distributes many sources of data to many customers"; col. 5, lines 7-9, Herz disclosed the system determining a subset of the available programs at a particular point in time which is most desirable for viewing by the customer and presenting the subset to the customer for selection);

said selection program used in selecting media content data streams for transmission to said individual user computer via said data stream controller, said selection program receiving feedback via said computer network indicating a preference corresponding to at least one of the media content data streams from the said individual user (Herz, col. 6, lines 50-56), said selection program performed by said at least one server being influenced but not controlled by said individual user preferences, said selection program using said individual user preferences to bias selection of data streams to be experienced at the said individual user computer and limiting the said individual user's control over selection of data streams from said database to prevent on-demand selection of a particular data stream by said individual user (Herz, col. 5, lines 1-10, Herz disclosed using an agreement matrix that compares customer profiles to content profiles to determine the subset; lines 7-12, Herz disclosed only offering a

subset of the available programs to the customer, thereby limiting the user's control to only programs within that subset, clearly preventing on-demand broadcast).

Claim 35 includes limitations that are substantially similar to claim 11. Claim 35 also includes the limitation, "taking into account individual user input identifying those data streams that to be excluded from being selected for transmission to said individual user computer. Herz disclosed filtering content to determine the subset most desired by the customer based on their feedback, and in one example the feedback including a showing of programs the customer did or did not watch (Herz, col. 6, lines 35-50). Therefore, Herz clearly disclosed filtering content based on user input. Such filtering of content must include excluding media from the media set in order to tailor the recommendations to the personalized interests of the user. Therefore, claim 35 is rejected under the same rationale as claim 11.

13. Regarding claims 12 and 36, Herz disclosed the limitations as described in claims 11 and 35, including wherein said computer network comprises the Internet (Herz, col. 51, lines 1-10).

14. Regarding claims 13 and 37, Herz disclosed the limitations as described in claims 11 and 35, including wherein said database is a song database and the data streams are songs (Herz, col. 4, lines 35-37).

15. Regarding claims 14 and 38, Herz disclosed the limitations as described in claims 11 and 35, including wherein said database is a music video database and the data streams are music videos (Herz, col. 4, lines 35-37).

16. Regarding claims 15 and 39, Herz disclosed the limitations as described in claims 11 and 35, including wherein said media content data streams are to be experienced via user interface comprises an electronic media player (Herz, Fig. 5, 412).

17. Regarding claims 17 and 41, Herz disclosed the limitations as described in claims 11 and 35, including wherein said selection program creates a playlist of data streams for transmission to said individual user (col. 5, lines 5-15).

18. Regarding claims 18 and 42, Herz disclosed the limitations as described in claims 17 and 41, including wherein said selection program modifies said playlist of data streams for transmission to said individual user according to said individual user preferences (col. 8, lines 55-60).

19. Regarding claims 21 and 46, Herz disclosed an apparatus comprising:  
at least one server configured to provide:

a rating tool, said rating tool receiving individual user preferences regarding one or more data streams played at an individual user computer by a media player, said individual user preferences comprising said individual user's ratings

associated with said one or more data streams (col. 8, lines 45-55, col. 14, lines 15-35);  
and

a playlist generator, said playlist generator generating playlists identifying data streams to be experienced by an individual user using said media player, said playlist generator selecting data streams for inclusion on said playlist according to said individual user preferences received from said individual user (col. 8, lines 45-55), said playlist generator biasing selection in accordance with said individual user preferences and limiting said individual user's control over data stream selection to prevent on-demand selection of a data stream by said individual user (Herz, col. 5, lines 1-10, Herz disclosed using an agreement matrix that compares customer profiles to content profiles to determine the subset; lines 7-12, Herz disclosed only offering a subset of the available programs to the customer, thereby limiting the user's control to only programs within that subset, clearly preventing on-demand broadcast).

Claim 46 includes limitations that are substantially similar to claim 21. Claim 46 also includes the limitation, "taking into account individual user input identifying those data streams that to be excluded from being selected for transmission to said individual user computer. Herz disclosed filtering content to determine the subset most desired by the customer based on their feedback, and in one example the feedback including a showing of programs the customer did or did not watch (Herz, col. 6, lines 35-50). Therefore, Herz clearly disclosed filtering content based on user input. Such filtering of content must include excluding media from the media set in order to tailor the



recommendations to the personalized interests of the user. Therefore, claim 46 is rejected under the same rationale as claim 21.

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

20. Claims 4, 9, 19, 23, 27, 32, 43 and 48 are rejected under 35 U.S.C. 103(a) as being unpatentable over Herz et al. (US 5,758,257).

21. Regarding claims 4 and 27, Herz disclosed the limitations as described in claims 3 and 26, including wherein the step of receiving preferences from sources other than the said individual user further comprises receiving by said at least one server via said network feedback expressing preferences from other users (col. 6, lines 55-67).

Herz did not explicitly state receiving feedback from commercial radio stations.

However, it was well known at the time the invention was made that commercial radio stations play a major role in the music industry by introducing new music to the public and receiving feedback from its listeners to determine which songs are popular.

Therefore it would have been obvious to one of ordinary skill in the art to receive feedback from commercial radio stations as another source in order for the server to

obtain feedback generated not only by the radio station itself, but also its fan-base, thereby more efficiently categorizing songs based on the public.

22. Regarding claims 9, 19, 23, 32, 43 and 48, Herz disclosed the limitations as described in claims 1, 11, 21, 24, 35 and 46.

Herz did not explicitly state wherein said step of transmitting one of said data streams further comprises transmitting said one of said data streams selected by said selecting method, said selection method taking into account sound recording restrictions in data stream selection.

However, it would have been obvious to one of ordinary skill in the art at the time the invention was made to take into account sound recording restrictions in data stream selections in order to comply with regulations regarding the broadcast of songs over the Internet.

### ***Conclusion***

**Examiner's Note:** Examiner has cited particular columns and line numbers in the references applied to the claims above for the convenience of the applicant.

Although the specified citations are representative of the teachings of the art and are applied to specific limitations within the individual claim, other passages and figures may apply as well. It is respectfully requested from the applicant in preparing responses, to fully consider the references in entirety as potentially teaching all or part

of the claimed invention, as well as the context of the passage as taught by the prior art or disclosed by the Examiner.

In the case of amending the claimed invention, Applicant is respectfully requested to indicate the portion(s) of the specification which dictate(s) the structure relied on for proper interpretation and also to verify and ascertain the metes and bounds of the claimed invention.

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to J. Bret Dennison whose telephone number is (571) 272-3910. The examiner can normally be reached on M-F 8:30am-5pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Tonia Dollinger can be reached on (571) 272-4170. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

/J. Bret Dennison/

Examiner, Art Unit 2443